No. 88-257

Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF JACOBSEN, Debtor

CASEY RZEPKA,

Petitioner,

VS.

GARY JACOBSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LOWELL MYERS
1060 W. North Shore
Chicago, Illinois 60626
(312) 262-8475

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

THE QUESTION PRESENTED FOR REVIEW

In 1929 the U.S. Supreme Court decided a basic principle of bankruptcy law. The purpose of the new rule was to reduce fraud and corruption in the bankruptcy court system.

The Supreme Court stated that henceforth certain cases of bankruptcy fraud would *not* be decided by the bankruptcy judges as a matter of credibility. Instead, they would be decided according to a factual and objective rule that was carefully explained by the Supreme Court. (*Morimura*, 279 U.S. 24.)

That decision by the U.S. Supreme Court was never changed or overruled by any later decision.

Is the legal rule of *Morimura* still the law today in the United States?

PARTIES TO THE CASE

The parties to the case are listed in the caption of the case.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
PARTIES TO THE CASE	ii
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS IN THE COURTS BELOW	1
JURISDICTION OF THE COURT	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	8
CONCLUSION	16

APPENDIX (Separately Bound)

TABLE OF AUTHORITIES

CASES:	PAGES
In re Chalik, 1984, 748 F.2d 616	15
In re Diorio, 1969, CA-2nd, 407 F.2d 1330	12
In re Houtman, 1978, CA-9th, 568 F.2d 651	13
In re Martin, 1985, CA-6th, 761 F.2d 1163	13
In re Mascolo, 1974, CA-1st, 505 F.2d 274	15
In re Mazzola, 1980, BC D. Mass. 4 B.R. 179	13
Morimura, Ari & Co. v. Nathan Taback, 1929, 279 U.S. 24, 49 S. Ct. 212, 73 L.Ed. 586	11, *passim*

STATUTES:	
1 U.S.C. § 1	6
11 U.S.C. § 727(a)	2, 9
28 U.S.C. §§ 151, 157	2, 3
28 U.S.C. § 158(a)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1746	6

Article on the Morimura Case: 73 L.Ed. 588	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF JACOBSEN, Debtor

CASEY RZEPKA,

Petitioner,

vs.

GARY JACOBSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Your petitioner, Casey Rzepka, respectfully requests that the court issue a writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit, to review the decision in this case.

OPINIONS IN THE COURTS BELOW

The bankruptcy judge made an oral statement. The district federal court made a 3 page written Memorandum

and Order. The U.S. Court of Appeals for the Seventh Circuit issued a 7 page written Order. None of these were published, and all of them are included in the Appendix.

THE JURISDICTION OF THE COURT

The decision of the U.S. Court of Appeals was dated and entered on June 8, 1988. The U.S. Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

This case was first filed in the Bankruptcy Court under 28 U.S.C. §§ 151, 157. It was appealed to the District Court under 28 U.S.C. § 158(a). It was appealed to the Circuit Court of Appeals under 28 U.S.C. § 1291.

THE STATUTE INVOLVED

(11 U.S.C. § 727(a))

The federal bankruptcy code provides:

> "The court shall grant the debtor a discharge, unless * * *
>
> (4) The debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account * * *"

STATEMENT OF THE CASE

There is no question about the facts of this case because every significant fact was admitted by the defendant. He either admitted them in the papers he filed in court (filed under penalty of perjury; which is considered the equivalent of an oath); or he admitted them on the witness stand while testifying under oath.

The admitted facts are as follows: The defendant filed a petition in bankruptcy seeking to avoid the payment of about $1,000,000 which he owed to various workmen and other persons. The bankruptcy case was filed in the Bankruptcy Court in Chicago, Illinois under 28 U.S.C. §§ 151, 157.

The defendant was required to file certain standard papers in the Bankruptcy Court and to answer certain standard questions. The purpose of the standard questions is to make sure that the defendant's prior financial dealings could be properly understood and properly examined by the trustee in bankruptcy, and by the workmen who had money due to them, and by other interested persons.

The Concealed Bank Accounts

One of the standard bankruptcy questions—was that the defendant was required to state the name and address of every bank account that he had used at any time during the past 2 years. That information would make it possible to trace the flow of money during the past 2 years, and see where the money went. The defendant answered that question by saying (under penalty of perjury) that he had used exactly 5 different bank accounts during the past 2 years; and he gave the names and addresses of those banks.

One of the workmen who had money due to him was a man named Casey Rzepka. He did not believe the defendant's statement that there had only been 5 bank accounts. The workman engaged a C.P.A. (an auditor) to investigate the matter. The auditor found 7 more bank accounts that the defendant had operated during the 2 year period. The defendant had concealed those 7 accounts.

Many of those concealed bank accounts were large, with monthly deposits of $30,000 or $40,000. The defendant had constantly transferred money from one concealed account to another.

The defendant then filed a paper in court admitting that there had been 7 bank accounts that he had not disclosed. He admitted the large transfers of funds from one account to another. (He had to admit this since copies of his checks were put into the record.)

The defendant now stated (under penalty of perjury) that he had used a total of 12 bank accounts during the 2 year period. (The 5 bank accounts originally disclosed, plus 7 more, made a total of 12 bank accounts.)

The workman Casey Rzepka did not believe this either. He instructed the C.P.A. to continue the investigation. The C.P.A. went back to work and succeeded in finding nine (9) *more* bank accounts which the defendant had also concealed.

He continued to conceal these 9 bank accounts even *after* he knew that people were hunting for missing bank accounts. This made a total of at least 16 missing bank accounts.

The pattern of activity on the other 9 concealed bank accounts was very similar to those previously found. Some

of them were large accounts with monthly deposits of $30,000 or $40,000. There was a constant transfer of funds by the defendant from one concealed account to another.

At that point the C.P.A. stopped his investigation (which was expensive). A total of 16 concealed bank accounts had been found. There could be many more bank accounts that were not found.

The fact that the defendant omitted 16 bank accounts was mentioned by the District Court in its factual findings.

The Concealed Business

Another of the standard bankruptcy questions that the defendant was required to answer, was to give *every business name* that he had used during the past 6 years. The significance of that question is that money and assets can easily be concealed under a trade name. If the trustee in bankruptcy and the creditors do not know what trade names have been used, they would not know where to look.

The defendant answered the question (under penalty of perjury) by giving two trade names. Actually, it was discovered that he had used at least three (3) of them. One of his trade names was "Todd's Hardware Supply Co." He had concealed his ownership of that business for years. That business was *not* a corporation. When he went into bankruptcy, he simply continued to conceal it.

The Concealed Corporation

In addition to all of the above matters, the defendant also concealed the fact that he had done business through a corporation which he had created. On the witness stand, at first he denied (under oath) that there had ever been

any corporation. However, he was confronted on the witness stand with the corporation charter, the corporation records, the corporation insurance policy, and a document written in his own handwriting. He then admitted that there was a corporation which he had previously denied.

As the District Court stated in its factual findings:

> "He (the defendant) denied that there was an incorporated entity, when, in fact, there was."

The False Statements Continued For About A Year

To summarize, the defendant was guilty of making *massive* false statements, which he continued to make over a period of about one year. The false statements were made under penalty of perjury, which is considered the same as if made under oath. (1 U.S.C. § 1, 28 U.S.C. § 1746.)

The Defendant Had All His Books And Records

When the defendant filed his false papers in court he stated (under penalty of perjury) that all of his records were available to him; that he had possession of all of them; and that none of his records had ever been lost, stolen, or destroyed. (Record, page 114.)

Nine months later, when he filed more papers in court, he again stated that all his books and records were available to him and that no record had ever been lost, stolen or destroyed. (Record, page 129.)

The Question Presented

The question presented by this case was whether the defendant had been guilty of a *reckless indifference to the*

truth; and therefore was not entitled to a discharge in bankruptcy.

This question raised the special rule of law set forth by the U.S. Supreme Court in the *Morimura* case. The Supreme Court held in that case that this should *not* be handled as a question of credibility. It should be handled according to certain factual rules set forth by the Supreme Court.

The Decision Of The Bankruptcy Judge

The Bankruptcy Judge treated the case as presenting *only a question of credibility*, and ruled in favor of the defendant, and gave him a full discharge in bankruptcy.

The rule of law that was set forth by the U.S. Supreme Court in the case of *Morimura* was brought to the attention of the bankruptcy judge; but he did not follow it.

The Decision Of The District Court

The District Court treated the case as presenting only the question of whether the defendant was ". . . intentionally lying. . ." The District Court held that this was a question of *credibility* to be decided by the bankruptcy judge. Thus, the District Court felt that it was required to uphold the decision of the bankruptcy judge, and did uphold it.

The rule of law issued by the U.S. Supreme Court in the case of *Morimura* was explained to the District Judge, but he did not follow it.

The Decision Of The Court Of Appeals

The Court of Appeals took the position that the sole question was whether the defendant had ". . . knowing-

ly. . ." made false statements; and that this was a question of *credibility* to be decided by the bankruptcy judge. The essential part of the Court of Appeals decision states:

> "* * * it is apparent the bankruptcy court concluded that appellant did not knowingly and fraudulently make a false oath or account. That finding of fact was not clearly erroneous. Therefore, it must be affirmed."

The legal rule set forth by the U.S. Supreme Court in the *Morimura* case was carefully explained to the Court of Appeals, which did not follow it.

ARGUMENT

The operation of our bankruptcy court system involves millions of people, and enormous sums of money.

Ever since the bankruptcy system was started, there has been a serious problem in regard to how to handle people who file bankruptcy papers in court, which are filled with false statements: and which are designed to *conceal* the truth about the financial affairs of the debtor.

In 1929 the U.S. Supreme Court made a serious effort to solve that problem. The Court devised a *very effective* remedy which was put into effect throughout the nation.

However, 60 years have gone by and there is now a question whether the Court's decision in 1929 is still valid law today. If it is still the law today, then there *is* an effective solution to the problem of fraud and perjury in the bankruptcy courts. If the Supreme Court's decision in 1929 is no longer the law today (which is what the Seventh Circuit thinks), then our bankruptcy system is right back where it was in 1928.

At the present time there is complete confusion as to what the law is on this *basic* question of bankruptcy law. In order to reduce fraud and perjury in the bankruptcy system, the Supreme Court should say clearly whether the *Morimura* case is still valid law today; or whether it is not.

The Former Version Of The Bankruptcy Law

The bankruptcy law formerly provided that if a person made a ". . . materially false statement in writing. . ." to obtain credit, then that person would not receive any discharge in bankruptcy. The U.S. Court of Appeals throughout the United States had generally held that this meant that the false statement must have been ". . . knowingly and *intentionally* untrue. . ."

The history of this matter is set forth in an extensive article attached to the *Morimura* case. The article appears at 73 L.Ed. 587, and nearly all of the older cases are collected there. The article summarizes the older law, as follows:

> "It has been generally held that objection to a discharge under this provision will not prevail unless the statement was *knowingly and intentionally* untrue. * * *" (73 L.Ed. 588, emphasis added.)

So, the older law, as applied by the Courts of Appeal, was very similar to our present-day bankruptcy statute. Our present statute reads as follows:

> "The court shall grant the debtor discharge, unless * * * (4) the debtor *knowingly and fraudulently,* in or in connection with the case—(A) made a false oath or account; * * *" (11 U.S.C. § 727(a).)

There is not much difference between the older version of the bankruptcy law (as it was then applied); and our modern present-day version. They are quite similar.

The Old System Led To Serious Misconduct

In 1928, under the old bankruptcy statute the creditor had to prove that the defendant ". . . knowingly and intentionally. . ." made the false statement. That was considered to be a question of credibility that would be handled by the bankruptcy judge (then called the bankruptcy "referee").

If the bankruptcy judge liked the defendant (or liked his lawyer) the bankruptcy judge could just say:

> "The defendant made a tremendous number of false statements, but I believe him when he says that it was not intentional."

If the bankruptcy judge said those ". . . magic words. . ." the defendant would get a discharge in bankruptcy, regardless of all the false statements he had made.

On the other hand, if the bankruptcy judge did not like the defendant (or did not like his lawyer) the judge could just say:

> "I don't believe him."

The trouble with this system was that it gave absolute power to the bankruptcy judge. It didn't make any difference what the facts were. The only thing that was important was whether the bankruptcy judge could be persuaded to say the magic words.

Since the bankruptcy judge was deciding a question of credibility, his word would be final. The District Court would affirm the bankruptcy judge automatically (". . . it's a question of credibility. . ."); and the Court of Appeals would affirm the District Court automatically (". . . it's a question of credibility. . .").

That method of handling cases gave the bankruptcy judge too much power. It has been said many times that unlimited power is a very dangerous thing.

"Power corrupts; and absolute power will corrupt absolutely."

In 1929 the U.S. Supreme Court decided to provide a solution to this problem.

The U.S. Supreme Court Decision In The *Morimura* Case

This problem eventually reached the U.S. Supreme Court in the case of *Morimura, Ari & Co. v. Nathan Taback,* 1929, 279 U.S. 24, 49 S. Ct. 212, 73 L.Ed. 586.

The Supreme Court found a solution to the problem. It was a solution that would be based on *objective facts*; not upon a decision of credibility made by the bankruptcy judge. A defendant who had made false statements could no longer get out of it by having a bankruptcy judge say a few suitable words.

The Supreme Court held that the creditor no longer had to prove that the false statements were made intentionally. The defendant who made false statements would automatically lose his discharge if the false statements were made:

> ". . . either with actual knowledge that it was incorrect, *or,* with *reckless indifference* to the actual facts, *without examining the available source of knowledge which lay at hand, and with no reasonable ground to believe that it was in fact correct.*" (279 U.S. 33, emphasis added.)

The Supreme Court said, in effect:

1. That if the defendant had his books and records and did not bother to use them;
2. And if the defendant had no reasonable ground to believe that his false statement was correct.
3. Then the defendant has been "recklessly indifferent" to the actual facts—and he does not get a discharge in bankruptcy.

This meant that such cases could now be decided on the basis of actual *objective facts*. The defendant could no longer escape responsibility for false statements by saying: "I forgot."

Under the new rule issued by the U.S. Supreme Court, if the defendant had his books and records at the time he made his false statements, then his verbal excuses would not be accepted.

Moreover, the higher federal courts could no longer *ignore* the bankruptcy system by saying: "It's a question of credibility". Under the new rule issued by the U.S. Supreme Court *it was no longer a question of credibility*". It was now a question of facts:

1. Either the defendant had his books and records, or he did not.
2. Either the defendant had a reasonable ground for saying what he said; or he did not.

The Supreme Court in the *Morimura* case made a fundamental change in the way bankruptcy cases were to be handled.

The Rule In The *Morimura* Case Today

The basic legal principle that was set forth by the U.S. Supreme Court in the *Morimura* case is apparently followed today in the Second Circuit.

> "Successful administration of the Bankruptcy Act hangs heavily on the veracity of statements made by the bankrupt. . . Statements called for in the schedules, or made under oath in answer to questions propounded during the bankrupt's examination or otherwise, must be regarded as serious business; *reckless indifference to the truth . . . is the equivalent of fraud.* * * *"

In re Diorio, 1969, CA-2nd, 407 F.2d 1330, 1331; emphasis added.

See also: *In re Houtman*, 1978, CA-9th, 568 F.2d 651, 656 (which cites the *Morimura* case); *In re Martin*, 1985, CA-6th, 761 F.2d 1163, 1167; *In re Mazzola*, 1980, BC D. Mass. 4 B.R. 179, 183.

The Seventh Circuit Cites The *Morimura* Case With Approval But Then Refuses To Follow It

The Seventh Circuit, in its Opinion in this case, cites the *Morimura* case *with approval*; but then proceeds to apply it in such a manner as to accomplish *the exact opposite* of what the U.S. Supreme Court intended.

The Supreme Court's objective was to have such cases decided according to objective facts; and *not* as a matter of "credibility" by the bankruptcy judges. The object was to *take away* from the bankruptcy judges the absolute power that they had obtained over such cases.

The Seventh Circuit indicates in the present case that it approves of the *Morimura* decision. But, then the court says that the question of ". . . reckless indifference to the available facts. . ." is just a question of *credibility*; which should be decided by the bankruptcy judge(!)

Thus, the decision in the *Morimura* case is turned *upside down* and rendered meaningless. The law in the Seventh Circuit is thus returned exactly to what it was in 1928.

The Opinion Of The Seventh Circuit

The Opinion issued by the Court of Appeals for the Seventh Circuit (Chicago) is filled with serious factual and legal errors.

There were 16 missing bank accounts as admitted in the trial court. This is *correctly* stated in the Opinion of the District Court. However, in the Court of Appeals Opin-

ion, the 16 missing bank accounts are changed to 9 missing bank accounts, for some unknown reason. (Of course, even 9 missing bank accounts is a fantastic "error".)

It was admitted in the trial court that the defendant had a corporation, which he had concealed. That was *correctly* found as a fact in the Opinion issued by the District Court. For some unknown reason, the fact disappears in the Opinion issued by the Court of Appeals.

The defendant in this case stated *twice* in writing (under penalty of perjury) that he had all of his books and records at the time he prepared his bankruptcy schedules. (Record, pages 114, 129.) Under the rule set forth in the *Morimura* case, that is a very important fact. The Court of Appeals Opinion leaves out that fact entirely.

The Court of Appeals decision contains numerous other serious errors.

Why Bank Accounts Are Concealed

When a person wants to conceal money, he often puts it into bank account "A". Then, he later transfers that money to a different bank, and puts it into bank account "B". He keeps on making transfers from one bank to another, through a series of perhaps 20 or 30 bank accounts. The last bank account in the line will be in Hong Kong or in some other remote place.

When the defendant files his schedules in bankruptcy, he reports only bank accounts A and B. He leaves out all the other bank accounts in the chain. A chain of bank accounts of that kind is sometimes called "the pipeline". He leaves out the chain of bank accounts on the bankruptcy schedules; and so it becomes impossible to trace the money and find out where it went.

It may be noted that the defendant in *this* case was found to be constantly engaged in transferring funds from one concealed account to another.

Truthful Information Is Essential To The Proper Operation Of The Bankruptcy System

The courts have held many times that truthful information is absolutely essential to the operation of the bankruptcy court system. (*In re Chalik*, 1984, 748 F.2d 616; *In re Mascolo*, 1974, CA-1st, 505 F.2d 274, 278.)

That was, of course, one of the reasons why the Supreme Court decided the *Morimura* case—to help insure that truthful information would be filed in court; and that defendants would not be allowed to hide behind *a wall* of falsehoods and deceptions.

The Legal Rule Of *Morimura* Applies To This Case

The legal rule set forth by the U.S. Supreme Court in *Morimura* applies directly to our present case:

(1) The defendant in this case had all his books and records.

(2) He put massive false statements into his bankruptcy papers.

The rule of *Morimura* applies automatically to such situations; and the defendant is not entitled to a discharge in bankruptcy.

CONCLUSION

The Supreme Court should grant the writ of certiorari and decide whether the *Morimura* case is still valid law in the United States today. It would certainly appear to be valid, since it was never changed or overruled by the Supreme Court at any later time.

If this rule of law is still valid today, this will have a very helpful effect upon our bankruptcy court system. It will go a long way towards reducing fraud, perjury and misconduct.

If the *Morimura* case is not the law today, then the court should say so. In that event, the bankruptcy court system will be back where it was in 1928. The improper activities that took place in 1928 are likely to be repeated.

The Supreme Court should seriously consider taking this case, for two reasons:

1. The bankruptcy court system involves millions of people.
2. The honesty and integrity of the bankruptcy system are very much involved here.

Respectfully submitted,

L. Myers

LOWELL MYERS
1060 W. North Shore
Chicago, Illinois 60626
(312) 262-8475

Counsel for Petitioner

Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-257
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF JACOBSEN, Debtor

CASEY RZEPKA,

Petitioner,

vs.

GARY JACOBSEN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LOWELL MYERS
1060 W. North Shore
Chicago, Illinois 60626
(312) 262-8475

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS TO APPENDIX

	PAGE
Opinion of the United States Court of Appeals for the Seventh Circuit, issued June 8, 1988 ...	A-1
Judgment of the United States District Court, dated July 7, 1987	A-7
Memorandum and Order of the United States District Court, dated July 7, 1987	A-8
Judgment of the United States Bankruptcy Court, issued February 12, 1987	A-11
Proceedings before the United States Bankruptcy Court on February 12, 1987	A-12
Judgment of the United States Court of Appeals for the Seventh Circuit, dated June 8, 1988 ...	A-15

APPENDIX

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 11, 1988

June 8, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

IN THE MATTER OF JACOBSEN
Debtor

CASEY RZEPKA
Plaintiff-Appellant,

No. 87-2237 v.

GARY E. JACOBSEN
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 3071—**James B. Moran,** *Judge.*

ORDER

Casey Rzepka, a trade creditor of the bankrupt, Gary Jacobsen, appeals from the district court judgment affirm-

ing the bankruptcy court's grant of discharge to Jacobsen. Rzepka's appeal centers on two primary claims. First, he asserts that in affirming the bankruptcy court the district court applied the wrong legal standard. Second, appellant contends that the bankruptcy court improperly determined that Jacobsen was entitled to discharge under the 11 U.S.C. § 727 discharge provision because Jacobsen "knowingly and fraudulently in or in connection with [his petition for bankruptcy] made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

I

In determining whether the district court applied the correct legal standard our review is *de novo*. *See In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985); *In the Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir. 1984). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 287, 103 S. Ct. 1781, 1789 (1982). Our review of the bankruptcy court's determination that Jacobsen was entitled to a full discharge under 11 U.S.C. § 727 is more narrowly limited. *See Kimzey*, 761 F.2d at 423. Our court has stated that, in general terms, "the right to discharge is left to the sound discretion of the bankruptcy court, and that an appellate court will not interfere with the decision of a bankruptcy court to grant a discharge unless there is a 'gross abuse of discretion.' " *In re Suttles*, 819 F.2d 764, 766 (7th Cir. 1987) (citation omitted) (quoting *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984)).

In this case our inquiry with regard to the propriety of the bankruptcy court's grant of discharge will focus only on the question of whether appellee knowingly and fraudulently made a false oath or account in connection with his petition for bankruptcy. Questions pertaining to a debtor's knowing or reckless falsehoods are questions of fact. *See Carini v. Matera*, 592 F.2d 378, 380 (7th Cir. 1979); *In re Nelson*, 561 F.2d 1342, 1347 (7th Cir. 1976). FED. R. BANKR. P. 8013 (1987) explicitly states:

> On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Like the district court, our review of factual findings of the bankruptcy court is also limited to the clearly erroneous standard. *Evanston Motor Co., Inc.*, 735 F.2d at 1031; *Kimzey*, 761 F.2d at 423. *See also In the Matter of Neis*, 723 F.2d 584, 589 (7th Cir. 1983); *In re Land Investors, Inc.*, 544 F.2d 925, 933 (7th Cir. 1976).

II

Appellant believes that the district court's conclusion that the bankruptcy court had determined that "the debtor, while incredibly sloppy, was not intentionally lying in his statement" demonstrates that in reviewing the bankruptcy court's grant of discharge to Jacobsen, the district court interpreted § 727(a)(4)(A) improperly. He submits that the district court read § 727(a)(4)(A) to require that a debtor make an intentional false oath or account in order for a denial of discharge to be warranted.

The portion of 11 U.S.C. § 727(a) relevant to this appeal states that "[t]he court shall grant the debtor a discharge unless—. . . (4) the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account." The language of § 727(a)(4)(A) is unambiguous. It clearly requires that for a debtor to be denied discharge he must have made a statement under oath which he knew was false and he must have made that statement with an intent to defraud. *See Williamson v. Fireman's Fund Insurance Company*, 828 F.2d 249, 251 (4th Cir. 1987). *See also In the Matter of Melnick*, 360 F.2d 918, 920 (2d Cir. 1966) ("The words of the statute requiring that the testimony be given 'knowingly and fraudulent-

ly' mean no more than 'an intentional untruth in a matter material to the issue which is itself material.' ") (quoting *Troeder v. Lorsch*, 150 F.2d 710, 713 (1st Cir. 1906)); *In the Matter of Kaufhold*, 256 F.2d 181, 185 (3d Cir. 1958) (in order for discharge to be denied "it is sufficient that the bankrupt knows what is true and, so knowing, wilfully and intentionally swears to what is false"). It also well established that the § 727(a)(4)(A) ground for denial of discharge is satisfied where the debtor makes a false oath or account material to his case with reckless indifference to the facts. *See Morimura Aria & Co. v. Taback*, 279 U.S. 24, 33, 49 S. Ct. 212, 215 (1929) (either actual knowledge that a statement was incorrect, or reckless indifference to the available facts, was sufficient grounds to deny discharge to a debtor under a predecessor provision to § 727(a)(4)(A)); *See also Diorio v. Kreisler-Borg Construction*, 407 F.2d 1330, 1331 (2d Cir. 1969) (holding, in a case involving a creditor's objections to a discharge, that reckless indifference to the truth is the equivalent of fraud).

When the district court's order affirming the bankruptcy court is read in its entirety there can be no doubt that it relied upon the proper § 727(a)(4)(A) standard in reviewing the bankruptcy court's grant of discharge. The district court opinion identifies the "knowingly and fraudulently" state of mind requirement established by § 727(a)(4)(A) for denial of discharge and then measures the bankruptcy court's determination that Jacobsen was entitled to discharge against that requirement. It concludes: "this court is confident that the bankruptcy court in fact found that Jacobsen's protestations of inadvertence, rather than fraudulent or reckless conduct were true." The subsequent paraphrase in the district court opinion of the bankruptcy court's conclusion that appellee while "incredibly sloppy, was not intentionally lying in his statement" does not establish that the district court applied the wrong standard for determining if the bankruptcy court had properly granted Jacobsen discharge. Rzepka's claim that the district court so erred is rejected.

III

Rzepka's claim that a denial of discharge under § 727 (a)(4)(A) was warranted in Jacobsen's case turns on appellee's concededly false statements in answering three of the questions on the Statement of Financial Affairs (SFA) form. First, Jacobsen failed to list nine defunct bank accounts in his name or the name of one or more of the several firms he owned and operated. None of those accounts was active on the March 4, 1986 date of appellee's original SFA and none had any monies in them after November, 1985. Appellant next points to Jacobsen's failure to report a $649.12 federal income tax refund he received in 1984 and two state income tax refunds he received in 1984 and 1985 that totaled $324.74. Finally, Jacobsen failed to list on his SFA the name of Todd's Hardware Supply Company, a corporation he operated in conjunction with one of his primary enterprises, Jacobsen Building Maintenance. Todd's Hardware Supply Company was not an independent firm. It was used solely as a vehicle to enable Jacobsen Building Maintenance to obtain supplies at wholesale cost.

The bankruptcy court was presented with all the evidence pertaining to these three omissions made by Jacobsen in filling out the SFA. It heard Jacobsen testify that his acts of omission were inadvertent and unintentional. The bankruptcy court believed Jacobsen and concluded that although he did make statements that were both false and material, discharge was still warranted under § 727. As the district court observed, the bankruptcy court's findings of fact with regard to Jacobsen's material false statements were "not particularly artful." Nevertheless, it is apparent the bankruptcy court concluded that appellant did not knowingly and fraudulently make a false oath or account. That finding of fact was not clearly erroneous. Therefore, it must be affirmed.

IV

The district court applied the correct legal standard in reviewing the decision of the bankruptcy court. The bankruptcy court's finding of fact that Jacobsen did not knowingly or fraudulently make a false oath or account was not clearly erroneous. Accordingly, the judgment of the district court is AFFIRMED.[1]

FOOTNOTE

[1] In his initial brief, counsel for appellant cited to an article in the December 9, 1986 issue of the Chicago Daily Law Bulletin and a second article in the July 1, 1987 issue of the American Bar Journal. In response to a question from the bench at oral argument, counsel acknowledged that neither of these periodical articles was a part of the record before the district court. Counsel's action in effectively incorporating the articles into the record on appeal by reference to them in his brief is in direct contravention of FED. R. APP. P. 10(a) and our, parallel, 7th Cir. R. 10.

FED. R. APP. P. 10(a) specifies the materials that are properly included in the record on appeal. It states: "[T]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases." Under this definition "only those matters that were in fact presented to the district court are considered part of the record on appeal." Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: Jurisdiction § 3956 (1977). Our court has previously held that "[t]he parties may rely on appeal only on materials furnished to the district judge." *Henn v. National Geographic Society*, 819 F.2d 824, 831 (7th Cir. 1987). *See also Tamari v. Bache & Company*, No. 87-1388, slip op. at 5 (7th Cir. January 20, 1988); *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Company*, 833 F.2d 633, 636 (7th Cir. 1987). We strongly rebuke appellant's counsel for his blatant abridgement of Rule 10(a) and admonish him to avoid similar transgressions in the future.

At pages 42-43 of the appellant's brief there is an *unsubstantiated* suggestion that the bankruptcy judge engaged in some sort of impropriety in making his ruling. When counsel was asked about this suggestion at oral argument, he could provide no further basis for his oblique allegation. Such conduct on the part of counsel is totally unacceptable.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE
CASE NUMBER 87 C 3071

CASEY RZEPKA

v.

GARY E. JACOBSEN

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the decision of the bankruptcy judge is affirmed. (See Memorandum and Order dated July 7, 1987)

Date July 7, 1987

/s/ H. STUART CUNNINGHAM
Clerk

/s/ WILLIE A. HAYNES
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASEY RZEPKA,

Plaintiff,

No. 87 C 3071 vs.

GARY E. JACOBSEN,

Defendant.

MEMORANDUM AND ORDER

A trade creditor appeals the decision of the bankruptcy judge discharging the debtor in bankruptcy. The decision of the bankruptcy judge is affirmed.

There is very little in this case, factually or legally, which is in dispute. The debtor, who was in the building maintenance and rehabilitation business, filed a schedule of debts and property which represented that his total secured debts were more than his total property. There were, in addition, almost $200,000 in unsecured claims. No one is attacking the substantial accuracy of the filings of debts and assets. He also filed a statement of financial affairs for a debtor engaged in business. This statement was false in material respects. The debtor listed five bank accounts as those which he had maintained within the two years immediately preceding the bankruptcy petition. After the trustee raised a question about the accuracy of that representation, apparently on the basis of records turned over by the debtor to the trustee, the debtor listed seven more bank accounts. The creditor here thereafter turned up nine more bank accounts. The debtor failed to list a business carried on under the name "Todd's Hardware Supply Co." He stated that he had not received any tax refunds during the two years immediately preceding

the filing of the bankruptcy petition. In fact, he had received a federal tax refund of $649.12 and a state tax refund of $324.74. He denied that there was an incorporated entity, when, in fact, there was. 11 U.S.C. §727(a) provides that debtor not be discharged if he knowingly and fraudulently, in or in connection with the case, makes a false oath or account.

The bank accounts which were not disclosed did not contain any assets at the time of the bankruptcy. The undisclosed business did not independently hold any assets. The tax refunds were, in the context of over a million dollars in liabilities, nominal and the proceeds had long since been dissipated. The operating entity was in substance disclosed. Nevertheless, the creditor contends, and we believe quite correctly, that a false oath regarding worthless assets does constitute a material omission.

The appeal flounders, however, on the issue of debtor's intent. The statute prohibits discharge when the debtor knowingly and fraudulently states a false oath or account, and the law equates reckless indifference to the truth with fraud. However, the bankruptcy court, having the benefit of the testimony of the debtor and his explanations, found that the debtor's conduct did not rise (or, perhaps, more accurately, fall) to that standard. The bankruptcy judge's findings were not particularly artful, as they referred to Jacobsen as not a "dishonest man." The creditor quite rightfully points out that the debtor's general character is not the matter in issue. However, in context, this court is confident that the bankruptcy court in fact found that Jacobsen's protestations of inadvertence, rather than fraudulent or reckless conduct, were true. Bankruptcy Rule 8013 provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. The bankruptcy court did judge the credibility of the debtor here and, while the record amply demonstrates false material statements, this court cannot conclude that the bankruptcy court was clearly erroneous in finding, in effect, that the debtor, while

incredibly sloppy, was not intentionally lying in his statement. A perception of the mental state of an individual is one particularly dependent upon perceptions of credibility. It is, therefore, accorded great deference upon review. While this court might perhaps have reached a different conclusion, the conclusion reached by the bankruptcy court was not clearly erroneous.

The court does note that the creditor's counsel submitted memoranda in a somewhat unconventional form. This court found them particularly easy to follow and commends counsel for the manner of presentation.

/s/ JAMES B. MORAN
Judge,
United States District Court

July 7, 1987.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(EASTERN DIVISION)

No. 86 A 812
(85 B 15349)

JUDGMENT
ON DECISION
BY THE COURT

CASEY RZEPKA v. GARY E. JACOBSEN
Plaintiff *Defendant*

This proceeding having come on for trial or hearing before the court, Honorable THOMAS JAMES, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

It is Ordered and Adjudged that Objection to discharge is overruled. Judgment is entered in favor of defendant.

/s/ WAYNE E. NELSON
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]
Date of issuance: 2-12-87

By: /s/ SHEILA ANDERSON
Deputy Clerk

IN THE
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of:	)	No. 85 B 15349
	)	No. 86 A 812
CASEY RZEPKA	)	Judge James
	)	
vs.	)	February 12, 1987
	)	11:00 a.m.
GARY E. JACOBSEN.	)	

PROCEEDINGS BEFORE
THE HONORABLE THOMAS JAMES

APPEARANCES:

MR. STEVEN B. LEVITT
appeared on behalf of the Debtor;

MR. BENJAMIN MYERS
appeared on behalf of the Plaintiff.

THE COURT: All during your arguments, gentlemen, and I appreciate your arguments but for the personal cast you give to—

It is not necessary, so don't do that.

I have been concerned about the problems that I hope that I have spoken to both—to you, Mr. Myers, and Mr. Levit—and I have been concentrating on the matter of Hussan, H-u-s-s-a-n, the case found in 56 BR 288 which makes some general statements of the law, trying to figure out just what these statements mean.

And I would call the parties' attention to page 290 where near the bottom of the first column the bankruptcy judge states: "To sustain an objection to discharge pursuant to section 727(A)(4)(a), the trustee or the creditor—" as in this case—"must establish that the debtor knowingly made a false statement under oath with the intent to defraud his creditors regarding a matter material to the administration of his estate. Cases cited".

There is no doubt that the answers to the various questions which have been admitted to have been, in the Court's words "false," regard matter material to the administration of the estate.

I am concerned about the statement in this case that says "the debtor knowingly." I look on—further on in this paragraph in the second—the right-hand column on page 90 where it says, "The subject matter of a false oath is material and thus sufficient to bar discharge if it bears a relationship to the debtor's business transactions or estate or concerns the discovery of assets, business dealings, or the existence and disposition of his property."

I am trying to equate or find out what that particular statement means as to the debtor knowingly making a false statement under oath.

It is difficult for this Court, under the facts that has been submitted to it, knowing the work, the fine work that this creditor did, to state that Gary E. Jacobsen knowingly made a false statement under oath unless the Court finds that such inattention was given to the preparation of the schedules and statement that the omissions that were made in the answers as shown by the amendments that were filed afterwards rise to such a extent to state that the debtor knowingly has done these various acts.

There has been no question that the debtor did, in fact, list all of his assets. The purpose of answering the statements in the—or the statements of the person filling out the statements is to give creditors an opportunity to make their own investigation, to make sure that every avenue to find out about the debtor's business affairs or personal affairs may be followed.

I cannot agree with the harshness of the Tabibian case. This Court is as much concerned about honesty and integrity of a debtor's filing. And I suppose what the answer is when we have a creditor who has undertaken to find out these facts as have been submitted to the Court through the proper investigation by Mr. Myers looking through records—and I will accept that statement even though we don't have any evidence other than his statement about that. And I smile because I don't like to consider lawyer's statements as evidence—

How do I protect these creditors to do that? But I cannot in good conscience say that Jacobsen is a dishonest man, and I suppose that is where it lies. He may be guilty of the grossest misconduct here in not taking care to fill out those questionaires, the statements of a person conducting business.

But I have no feeling, from having observed his testimony and accepting his statements, that he is the type of dishonest person who should not have a discharge. And I suppose that is where the answer will lie, Mr. Myers; and therefore the objections to the discharge will be overruled and Mr. Jacobsen will receive a discharge. Thank you very much.

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

IN THE MATTER OF JACOBSEN
Debtor

CASEY RZEPKA,
Plaintiff-Appellant,

No. 87-2237 vs.

GARY E. JACOBSEN,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-C-3071—**James B. Moran**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.